FILED
FEB 25 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 438.

UNITED STATES

vs.

GEORGE E. CADAAR AND OTHERS.

BRIEF ON BEHALF OF EDWARD PARKER, ONE OF THE RESPONDENTS.

H. PRESCOTT GATLEY,
Attorney for Edward Parker, One of the Respondents.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 14901

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 438.

UNITED STATES

vs.

GEORGE E. CADAAR AND OTHERS.

BRIEF ON BEHALF OF EDWARD PARKER, ONE OF THE RESPONDENTS.

STATEMENT OF FACTS.

On the 25th day of April, 1901, the defendant Edward Parker, together with three others, was arrested on the charge of conspiracy, and on the same day was held to await the action of the grand jury upon such charge. On April 27, 1901, he entered into a recognizance, with surety, conditioned for his appearance in the supreme court of the District of Columbia at the then present or any future term thereof until the said cause should be finally disposed of, and to answer such charge of conspiracy.

No further action was taken in the case until the 31st of March, 1902, when an indictment for conspiracy against him and the three others was filed in that court.

On April 7, 1902, he was arraigned upon the indictment and entered a plea of not guilty. This plea was subse-

quently, on May 1, 1902, withdrawn and a motion to quash the indictment filed.

The grounds upon which this motion was based were:

> "*First.* Because said indictment was not returned into court within nine months after the 25th day of April, 1901, on which said day this defendant was held to bail to await the action of the grand jury on said charge of conspiracy; the time for taking action in such case not having been enlarged by this court, or any justice thereof (as appears from the record herein), as provided by section 939 of the act to establish a code of law for the District of Columbia, approved March 3, 1901.
>
> "*Second.* Because of other errors, defects and omissions appearing on the face of the record in this case."

On the 3d day of March, 1901, nearly two months *before* the arrest and holding to bail of the defendants herein, Congress passed an act providing a code of law for the District of Columbia, to go into effect and operation from and after the 1st day of January, 1902.

By section 939 of the act it is provided:

> "SEC. 939. *Abandonment of Prosecution.*—If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such charge shall be deemed to have been abandoned and the accused shall be set free or his bail discharged, as the case may be:
>
> "*Provided, however,* That the supreme court of the District of Columbia holding a special term as a criminal court, or, in vacation, any justice of said court, upon good cause shown in writing, and, when practicable, upon due notice to the accused, may from time to time enlarge the time for the taking action in such case by the grand jury."

It was upon this section that the motion to quash was based.

Almost a year after the motion to quash was filed it was heard by the supreme court of the District, and sustained.

From this order the Government prosecuted an appeal to the Court of Appeals, and on June 30, 1904, the ruling of the lower court was affirmed.

Subsequently the Government applied to this court for a writ of certiorari to review the decision of the Court of Appeals, which application was granted.

ARGUMENT.

Section 939 of the Code applies to cases pending at the time it went into effect, viz., January 1, 1902.

It is perfectly manifest from the language used in the above section that Congress intended it should apply to cases pending when the Code should go into effect and operation, for it will be noted that the language used is "that if any person *shall have been* committed," etc. * * * "and within nine months *thereafter*, the grand jury *shall not have* taken action on the case," etc. If Congress had intended that this section should apply only to cases arising after the 1st of January, 1902, it would have provided that *from and after* that date if any person charged, etc. The language used, however, negatives this idea, and clearly shows, as before stated, that it was the intention of Congress that it should apply to all cases pending when the Code went into effect.

As if to remove any doubt upon this question it is provided in section 1638 of the Code:

> "That the provisions of this Code relating to procedure or practice and not affecting the substantial rights of parties shall apply to pending suits or proceedings civil or criminal."

And we find section 939 to be the last section in chapter 20 of the Code, entitled "CRIMINAL PROCEDURE."

The position of the Government in contending that section 939, relating as it does to practice and procedure (Kring *vs.* Missouri, 107 U. S., 226), does not apply to this case because it was pending at the time the Code went into effect is absolutely inconsistent, since it avails itself of the provisions of section 935 of the same chapter to secure a review of the judgment of the trial court in this case on appeal. Section 935 gives to the Government a right of appeal in criminal prosecutions, a right which it did not have before the passage of the Code.

Hence it follows that if the provisions of chapter 20 do not apply to cases pending at the time the Code went into effect, the Court of Appeals was without jurisdiction to review the judgment of the lower court in this case, and should have dismissed the appeal.

In holding that section 939 applied to the case at bar the court did not in any way prejudice the rights of the Government, because, in the first place, there was a reasonable time after the 1st of January, 1902, and before the expiration of the nine months after the defendants were held to bail to await the action of the grand jury, within which the Government could have indicted them.

It is undoubtedly within the power of the legislature to pass statutes of limitation to change the periods of statutes of limitations previously fixed, and to make such statutes or changes applicable to existing rights or pending actions. The language of the statute must control, and if the intent of the legislature appears to be to make the new statute applicable to existing rights or pending causes of action, such effect must be given accordingly.

Sohn *vs.* Waterson, 17 Wall., 596.
Koshkonong *vs.* Burton, 104 U. S., 668.
Marx *vs.* Hanthorn, 148 U. S., 173.

The new statute of limitations made to take effect at a later date is to be regarded as embracing causes of action accruing prior to its enactment and pending at the time it is to take effect, the period of time between its enactment and the date when it is to become effective being presumed to have been intended by the legislature for the beginning of such actions or prosecutions as can be barred by the new statute upon its taking effect, and as due notice that such actions would be barred if not begun or proceeded with within that period.

Wrightman *vs.* Boone Co., 82 Fed. Rep., 413.

Statutes in the nature of limitations which affect existing rights should afford reasonable time for the commencement of an action before the bar takes effect.

Terry *vs.* Anderson, 95 U. S., 628.

Koshkonong *vs.* Burton (*supra*).

Where a new act is made to take effect at a date appreciably later than its passage, the date of passage is to be taken as the starting point in determining whether a reasonable time has been allowed, and not the date on which it is to take effect.

Ross *vs.* Duval, 13 Pet., 45.

Wrightman *vs.* Boone Co. (*supra*).

Hart *vs.* Bostwick, 14 Fla., 180.

Hedger *vs.* Rennaker, 3 Met. (Ky.), 255.

State *vs.* Jones, 21 Md., 432.

Pierce *vs.* Tobey, 5 Met. (Mass.), 168.

Bigelow *vs.* Bemis, 2 Allen, 496.

Stine *vs.* Bennett, 13 Minn., 153.

Duncan *vs.* Gaslin, 20 Neb., 347.

Osborn *vs.* Lindstrom, 9 N. Dak., 1.

Merchants' Nat. Bank *vs.* Braithwaite, 7 N. Dak., 358.

Korn *vs.* Brown, 64 Pa. St., 55.

Eaton *vs.* Manitowoc Co., 40 Wis., 668.

In the second place, if the Government found that the time left was not sufficient to enable it to procure an indictment within the nine months limited by section 939, all that was necessary for it to do, under the provisions of the section, was to make such showing in writing to the court and have the time enlarged by the court. By this means it could have extended the time indefinitely, provided they made such a showing as would justify it.

Having failed to have the time extended within the nine months limited by the section, the Government, by its own laches, lost the right to do so.

District of Columbia *vs.* Roth, 18 D. C. App., 547.

Section 939 of the Code is a special statute of limitations.

This section of the Code was intended as a special statute of limitations, supplemental to the general statute of limitations in force in the District. This latter statute is found in section 1044, R. S. U. S., and provides:

> "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information instituted within three years next after such offense shall have been committed."

This section was continued in force by section 1 of the Code.

There is no conflict whatever between these two provisions of the law. Section 1044, R. S. U. S., operates from the time of the commission of the offense, while section 939 of the Code operates from the time the Government lays hand upon the defendant and commits him to jail or holds him to bail to await the action of the grand jury upon the charge of such offense.

The two provisions of law are harmonious, and both should be given effect.

The language of section 939 is plain, simple, and unambiguous, and there is no difficulty in determining what the legislature meant by it.

It clearly means that in cases where a person is charged with a criminal offense and is committed to jail or held to bail to await the action of the grand jury upon such charge, unless the grand jury shall ignore the charge or find an indictment thereon within nine months thereafter, the prosecution of such charge shall be deemed to have been abandoned, relinquished, and given up. In other words, that unless the defendant is indicted within nine months after his commitment or admission to bail, in the absence of an enlargement of such time, the Government is thereafter barred from the prosecution of such charge. It is a wholesome law, and affords a valuable protection to the citizen.

This section of the law requires a greater degree of diligence on the part of the Government in the prosecution of criminal offenses than was required of it prior to its enactment. Undoubtedly the legislature had the right to do this, and if the Government failed to exercise the diligence required of it by the law, and thereby placed itself in a position where it could not further prosecute the charge, it has no one to blame but itself. It was a matter the defendant had nothing to do with, and he is in no way responsible for the predicament of the Government in the case.

As was said in the case of Durham *vs.* The State of Georgia, 9 Ga., 306, in construing a law of that State having in view the same objects as section 939 of our Code:

> "It was wisely and humanely framed to carry into effect that provision of the constitution which declares, that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial.' And this construction places no great burthen upon the State. She has at her command ample means of collecting testimony and preparing for trial; she can

> recognize witnesses to appear and testify; she can coerce their personal attendance from all parts of the State, and provision is made to defray their expenses; she cannot be taken by surprise, as six months' previous notice has to be given that a trial will be claimed. If, under such circumstances, she is not ready, the legislature, to remedy the evil under the English practice, of suffering the Crown to delay the prosecution until it suited its purposes to terminate it, has interposed this statutory bar or limitation."

Section 939 was enacted to fit particular facts and conditions, and surrounds the prosecution of charges of criminal offenses with certain limitations. It requires the Government to *enforce its remedy* within a limited period of time. If it fails to do this, its remedy is gone.

It will not do to argue that the defendant is taking advantage of a technicality, or that a guilty man may escape on a mere technicality. The defendant in this case, as in all cases, is by the law presumed to be innocent, and that presumption clings to him until his guilt has been established.

The defense of the statute of limitations is a substantial one, so regarded by the highest court in this country, and is founded upon sound principles of public policy.

It is asserted by the Government that the effect of section 939 of the Code is to change the statute of limitations in respect of crimes from three years, as provided in section 1044, R. S. U. S., to nine months whenever the accused shall have been committed or held to bail.

This is by no means a fair statement, nor is it true in point of fact.

As before stated, under the provisions of section 939 the court has the power to enlarge the time, and the extent to which it may so enlarge the time is not limited. It might enlarge the time beyond the period of three years fixed by section 1044.

On the other hand, suppose in the case at bar, before the

expiration of the nine months, the court upon applications had from time to time enlarged the time to a period exceeding three years, and after that period an indictment had been returned into court.

Suppose, further, that to this indictment the defendant had pleaded the provisions of section 1044, R. S. U. S., in bar to the indictment, would the Government have thrown up its hands and admitted the plea good? On the contrary, it would have maintained with all the force at its command that the plea was bad and constituted no defense.

It follows, therefore, that the Government is in no degree prejudiced by the provisions of section 939 of the Code.

Section 939 relates to the offense charged, as well as to the person of the defendant.

It is contended by the Government that this section relates only to the person of the defendant, and to his liberty if committed or to the discharge of his bail in case he has given bail, and not to the offense charged. This contention is clearly untenable, for the language of the section demonstrates that the legislature had in mind both subjects.

It provides that if any person *charged with a criminal offense* shall be committed, etc., and within nine months thereafter the grand jury shall not have found an indictment, *the prosecution of such charge—i. e.*, the criminal offense charged—shall be deemed to have been abandoned, and thereupon one of two things shall be done, viz., that the accused be set free or his bail discharged, as the case may be.

In order to support this theory of the Government it is absolutely necessary to ignore one of the most important clauses of the section—*the prosecution of such charge shall be deemed to have been abandoned.*

There is no rule of statutory construction that would justify the court in doing this.

> "It is a cardinal rule of statutory construction that significance and effect, shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.'"
>
> Market Co. *vs.* Hoffman, 101 U. S., 112, 115.

> "It is well-settled law that every word of a statute is to receive effect and to be construed according to its ordinary and natural signification, and the strict letter is not to be departed from without good and sufficient cause."
>
> Mackall *vs.* District of Columbia, 16 App. D. C., 301.

Again, if the contention of the Government in this respect be correct, the last-mentioned clause could have been entirely omitted from the section, in which event it would read as follows:

> "If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge, or by returning an indictment into a proper court, the accused shall be set free or his bail discharged, as the case may be: *Provided*," etc.

This illustration, it is submitted, clearly shows that the legislature had more in mind than the mere release of the defendant from imprisonment or the exoneration of his bail.

It had in mind the limiting of the time within which the grand jury might take action on a criminal charge after commitment of the defendant or his holding to bail, and it so limited the time to nine months. This, to the mind of the legislators, was a sufficient time for a charge of a criminal

offense to hang over the head of a presumably innocent man without action by the grand jury.

In order, however, to prevent the ends of justice from being defeated by the inability of the grand jury to act within the time limit, by reason of the absence of witnesses or what not, it provided a means by which such time could be enlarged. This shows that it was the intention of the lawmakers to bar further prosecution of such charge, unless the action of the grand jury in returning an indictment into the proper court was taken within the nine months or the extension of such time as fixed by the court.

It is contended by the Government that even though it fail to observe the provisions of this section and fail to indict within the time limited therein, or any extension of such time by the court, it may do so at any future time within the three years limited by the general statute of limitation. The answer to this is that the only extension of time contemplated by the section is to be had at the hands of the court, and then, too, after a showing of good cause in writing. No such extension was sought or had in this case.

If it was intended that the grand jury could take action after the expiration of nine months without any enlargement of the time, what was the necessity of the addition of the proviso to the section? None whatever. And if the position of the Government in this respect be correct, then it must be held that the language of the proviso is but a mass of idle words, without meaning and without bearing or relation to the other portions of the section.

In support of its contention counsel for the Government cites authorities holding that a *nolle prosequi* does not bar a further prosecution of the offense. This is begging the question at issue.

Section 939 does not purport to cover or apply to such a case. It may well be that in a case where an indictment is returned within the time limited therein, which is afterwards *nolle prossed*, the Government might further prosecute.

In such a case this contention would apply with greater force, for the *diligence* required of the prosecution by the law would be present. In the case at bar it is conspicuous by its absence.

In the case of U. S. *vs.* Hayman, 32 W. L. R., 491, the defendant was, on March 22, 1902, arrested for violating section 4746, R. S. U. S., and held to bail to await the action of the grand jury. Upon July 14, 1902, an indictment was returned against him by the grand jury, and three days later he was released on bail.

Upon April 20, 1903, more than nine months later, a second indictment was returned against him, charging, in different language, the same offense covered by the first indictment.

To this latter indictment the defendant interposed a plea in abatement based upon section 939 of the Code.

The trial court sustained this plea, but on appeal the Court of Appeals reversed the judgment, holding that:—

> "All cases wherein the grand jury has within nine months taken action one way or another, either by ignoring or by indicting, are exempted from the operation of the section and are left within the operation of the rules of the common law, according to which the pending of one indictment has nothing to do with the question of the propriety or validity of further indictments for the same offense."

The court in its opinion further says:

> "The grand jury did take action on the case within nine months, for it returned the first indictment within four months from the holding over to await its action. The question is not whether a second indictment was returned later than nine months after a holding over, but is whether such proceedings were had by action within nine months as prevented the application of section 939 to the case. The grand jury having taken action by indicting within nine months, the provisions of section 939 never attached to, and had no operation upon the case."

As this case turns upon the proper meaning of the language used in section 939 of the Code, it is difficult to find authority directly in point. While many of the States have laws the objects of which are similar to the objects of our law, yet the language of those laws is so different from ours that the adjudicated cases shed very little light on the subject.

The following cases, it is submitted, support the contention of the respondent:

Jackson *vs.* State, 76 Ga., 551.
Stewart *vs.* State, 13 Ark., 720.
Johnson *vs.* State, 42 Ohio St., 209.
State *vs.* Wear, 145 Mo., 162.
McGuire *vs.* Wallace, 109 Ind., 284.
In re Edwards, 35 Kansas, 103.

The decisions of the courts of the States of Virginia, Mississippi, California, South Carolina, and Colorado, cited by the Government, are not applicable to this case. An examination of the statutes of those States discloses that they relate solely and exclusively to the discharge of the defendant from imprisonment. There is no clause in those statutes, as is contained in ours, with regard to the abandonment of prosecution of the charge, and no presumption of such abandonment is created in them by the lapse of time.

The respondent is not guilty of laches and has waived none of his rights.

It is further contended by the Government that the defendant has lost his right to avail himself of the provisions of section 939 as a defense:

First. Because he entered a plea of not guilty to the indictment.

Second. Because he did not move to discharge his bail immediately after the expiration of the nine months.

With regard to the first position taken, the record shows that the plea of not guilty was withdrawn and the motion to quash filed. Presumably, and it is the fact, the right to do this was reserved at the time of arraignment.

No objection was made at the time by the Government to the withdrawal of the plea and no exception taken to the ruling of the court in permitting it to be done.

This action of the trial court was one entirely within its discretion and is not subject to review on appeal.

The second reason is equally without force. The Government says that it is too late for the defendant to put forth the defense of the statute after an indictment has been found, even though it be found after the period of nine months limited by the statute. Can this be true? Is it incumbent upon a defendant to plead the statute of limitations until some action in contravention of his right is taken? Is it possible for him to do so? Certainly not without "putting the cart before the horse."

Then, again, the section requires no action to be taken by the defendant.

If the case is not ignored or an indictment returned within nine months without enlargement of such time by the court, the law fixes the status of the prosecution—it is deemed to have been abandoned—and provides in imperative terms that the accused *shall* be set free or his bail discharged, as the case may be.

The charge of laches made against the respondent is utterly without foundation.

By the failure to take action in his case he was by the Government lulled into a feeling of security, and he assumed, as the law says he might, that the prosecution of the charge had been abandoned, and rested upon the defense given him by that section of the law.

So soon, however, as the Government sought to revive the prosecution of the charge of the offense which was dead under the law, he asserted his defense.

It is respectfully submitted that there is no error in the record, and that the judgment of the court below should be affirmed.

H. PRESCOTT GATLEY,
Attorney for Edward Parker, One of the Respondents.